The Sense and Nonsense of a Copenhagen Commission

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Claudio Franzius Mo 8 Apr 2013

1. Failings

The political actors themselves admit that it was a mistake to push for fulfillment of the Copenhagen criteria for accession while having no evaluation mechanisms for reviewing a country's sustained adherence to the criteria following its accession – and now arguing that this could be set aright through establishment of a Copenhagen Commission, understood as a watchdog, that red-flags a given country's drift into crude nationalism à la Hungary.

It is also correct that we not expect too much of the "nuclear option" of Article 7 of the Treaty on European Union (TEU). The process does not provide for any expulsion from the European Union and there are good reasons for this – reasons owing to the fact that the EU is a voluntary amalgamation of states. It is not an imposed community but a legal community. And it must be recalled that the treaties make no provision for expulsion from the euro zone; it is rather the case that a state must be induced by the other states to initiate the process of withdrawal from the EU. But as Müller opines in his essay, more scandalous than the lack of disbarment possibilities is how national governments systematically turn a blind eye to EU violations, a situation which is not to be remedied through a new institution and one which can hardly impress a government that is unwilling to integrate.

And how the European project is to be handled is indeed the concern of national actors. As long as the European parties in the European Parliament function merely as offshoots of national parties and have no greater autonomy, then it is inconceivable that Hungary's Fidesz should be excluded from the European People's Party or that Romania's Social Liberal Union (USL) should be disbarred from the Party of European Socialists.

2. Democracy: Contexts and Options

Müller is right in asserting that preserving the intactness of member-state democracy is a European question. Because the EU derives a portion of its authority from the member-states, it is dependent on the functioning of member-state democracy. In other words, if the EU wants to be democratic then it cannot afford to be indifferent toward its democratically constituted member-states. Putting this question on the backburner could prove disastrous for Europe. In terms of preserving a liberal-democratic structure in the member-states, the political measures of the EU bodies would appear to be rather impoverished and a dangerous imbalance has emerged between 1) chasing one democratically elected government after the other from office by means of the German-European austerity plan in the euro-crisis and 2) idly looking on as democracy deteriorates not only on the periphery of Europe (Ukraine) but at its heart (Hungary). However, what are the options? We can draw a distinction between:

Short-term and long-term measures. The Commission contents itself with the traditional approach of selectively reprimanding violations of the treaty. On the other hand, long-term strategies for protecting member-state democracies are hardly in evidence. The remedy might be a Copenhagen Commission that takes precedence over all existing procedures and which, as recommended by Müller, could keep an eye on *all* member-states by raising the "political alarm."

But a distinction must also be made between the possibilities presented by the logic of the federative fusion and new processes in safeguarding democracy that might require changes in the treaty – as a non-hierarchical order, the European Union is based on voluntary compliance with EU law. Not compulsion but reciprocal recognition of rights and duties is the basis of the European project. This supports the notion of continuing to bank on the decentralized mechanisms of legal enforcement in order to buttress the self-empowerment of member-state institutions in developing and formulating European prospects and perspectives. Only this will

pave the way for acceptance of European values not as foreign values but as one's own. Were EU bodies to intervene politically then Müller sees the danger of paternalism emerging – but he believes that this is acceptable because there are no solely national matters in the EU as a political community. And this is indeed correct – but it cannot belie the fact that (highly improbable) treaty revisions are necessary for establishing a politically effective entity for safeguarding democracy.

Because the self-legitimization of EU political authority cannot be construed as analogous to that of the state – the European Union instead remaining dependent on functioning political systems in the member-states – proposals must keep in view both the specific federated structure of the various interlocking levels and the mutual interplay of law and politics in the multilayered democracy. It is in this respect that the question is important as to who should be appointed to defend democracy. To the extent that individual rights are at issue, it is not possible to deny the courts a special role in preserving fundamental rights. This holds for national as well as European courts. The structural weaknesses of political measures can be compensated for through juristic solutions, but political and legal "problem-solving options" are of a different nature. Political solutions, as called for by Müller, will mean the loss of great potential gain while at the same time hardly rendering the courts expendable; by contrast, legal solutions that can be brought by EU citizens before their national courts must heed the limits of a judicial protection of democracy that exceeds the safeguarding of human rights.

3. Law and Politics

Müller neglects this point. His proposal for a Copenhagen Commission is neither fish nor fowl – neither is it a political solution nor is it persuasive from a legal point of view. On the one hand, were he to have his way, political options would be blocked by reason of the existing executive-federalism; on the other hand, a "reverse Solange doctrine" is too legalistic and unpolitical because it is focused on EU citizenry. This must be gainsaid. It is insufficient to simply join Jürgen Habermas in condemning the EU's executive-federalism – along lines of which the German "Bundesstaat" operates – since it does indeed mirror those democratic entanglements in preserving member-state democracies, an aspect which distinguishes the EU from a structural point of view. And in the European legal community it cannot be a simple case of pitting the law against politics. It is beyond dispute that a political solution must be found for political problems, and there is also little doubt that the EU must be politicized; but there is no disputing the fact that the law is responsible for delineating the barrier for political interventions in the member-state democracies. What must not ensue is mindless "political alarm" that casts aside all criteria. There is much to be said for taking the systematic injury of fundamental values as set down in Article 2 TEU as a guideline. What remains uncertain is the degree to which adherence to these values is a prerequisite for laying claim to national constitutional identities along lines of Article 4(2) TEU. But the ensuing reversal of the "Solange" doctrine through activation of the Ruiz Zambrano decision is not a centralistic strategy to break down the wall between national law and that of the EU; rather, it is embedded in the development context of the EU legal order, which, regardless of what one may think of it, forms the basis of the political project of European integration alongside the constitutional systems of the member-states. To bank on the law as the linchpin of the community is not an idealistic stance but rather a *realistic* one since the EU is not based on a collective macro-subject but on those citizens who must naturally be in a position to effectively bring their rights to bear within the European legal space. This does not replace political processes, but it is a decentralizing strategy dependent on national institutions bringing these certain disputes before the ECJ. And it fails to solve the problem of a disempowered Hungarian constitutional court, for the actual addressees of the submission proceedings are the specialized courts, and so in the final analysis it is more suitable for everyday life than for political conflicts whose staging and channeling can with good reason – as urged by Agnes Heller – be left to the Hungarian political opposition.

Why then a Copenhagen Commission as a body that does not replace the existing instruments but that can urge their deployment? Whence would such a commission derive its authority? It should not only concern itself with the preservation of individual rights but with initiating political solutions. One cannot be blamed for doubts as to whether a "committee of philosophers" is in any better position than existing institutions to call things by their proper name and find solutions for them.

Why not the *European Commission*? Müller betrays the reasons. One cannot have both at once – democratic

protection and institutions to protect democracy that derive their legitimacy through direct democracy. Whosoever desires the politicization of the Commission cannot expect it to impartially safeguard the treaties. By contrast, Müller desires a holistic quasi-court whose jurisdiction encompasses the entire political landscape and whose authority would be more than precarious. And one can also doubt whether a Copenhagen Commission would have greater effectiveness than the Venice Commission of the European Council, particularly as this latter criticized certain essential points bearing on the situation in Hungary – the weakening of the constitutional court, the inordinate use of the cardinal laws, the vague definition of freedom of the press and minority rights as well as the equally vague description of the Hungarian state's relationship to the Hungarian minorities living outside of the country's borders – to largely no effect at all. It is indeed the case that we need fewer constraints and more "empowerment". Citizenry and member-state institutions must be empowered to fight for the EU's shared values. Insofar one can discern a precondition of political change in supporting the safeguard of fundamental EU civil rights and for which the local political powers are responsible. Thus fortifying citizens in bringing their affairs before the institutions of their home countries as European affairs does not aim at replacing but enabling political solutions that are otherwise legally coddled.

And why a *single* institution? Activation of the ECJ is not a centralist solution but rather expression of a pluralistic arrangement that is politically mirrored in constitutional pluralism. It is perhaps no accident that Article 4(2) TEU goes unmentioned by Müller, and so he overlooks that essential building block of a constitutional system whose business it is to achieve a decentralized implementation of the fundamental values and which is opposed to any solution arrived at through an expanded infringement action by the Commission that possesses no criteria.

It is in this respect that Müller's proposal is very German and recalls Erich Lüth and the value system that yearns for an authority from whom we expect the clarification of fundamental questions, whether they be of a legal or a political nature. There is nothing that militates against this type of institutional thinking (by no means self-evident in the discipline of political science) but a single authority – whether it be merely a Copenhagen Commission that issues recommendations or the "ultimately binding" decisions of a constitutional court – no longer exists in constitutional pluralism. This holds for the member-states and their various bodies as well for the EU and new institutions like the Copenhagen Commission, which finally promises more than it can deliver.

Translation: Kevin McAleer

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